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NO. 98 187

In the Supreme Court of the United States

OCTOBER TERM, 1998

MORRIS PELTIER, JR.
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the statute under which Petitioner has been indicted (La. R.S. 30:2183 G. (1)) provided him with adequate prior notice that it was a crime to *store* hazardous waste, where the language of the statute does not prohibit "store" and where the Bankruptcy Court oversaw and acquiesced in the "storage" of wastes for which Petitioner is now being prosecuted - *viz.*, **Whether the criminal statute is unconstitutionally void-for-vagueness?**

PARTIES TO PROCEEDINGS BELOW

Petitioner, Morris Peltier, Jr., is the only party defendant in the lower court proceedings who is filing this Writ Application. The State Attorney General is expected to appear in this matter. The Louisiana Department of Environmental Quality filed an amicus curiae brief in the Louisiana Supreme Court, and the U. S. Attorney's Office acted as "lead counsel" representing the State in proceedings before the Louisiana Supreme Court. A copy of this writ application is being served by mail upon each of these state and federal government attorneys.

There are no parent or subsidiary companies to be listed pursuant to Supreme Court Rule 29.6.

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REPORTS OF OPINIONS DELIVERED BY LOWER COURTS

(a) *Decision of the Trial Judge*

There was a hearing in open court on the Defendants' Motion to Quash. Evidence was taken, and Judge Aaron rendered his decision from the bench. The Defendants fell into two categories: those, who like Petitioner Peltier, were charged with storage of hazardous waste under La. R.S. 30:2183 G.(1), and others charged with storage of hazardous waste under La. R.S. 30:2183 G.(2). The court denied the motion to quash criminal charges under 2183 G.(2), but did quash the indictments for "storage" of hazardous wastes under 2183 G.(1):

> ...[T]he State acknowledges that "storage" is not a specifically proscribed act under G-1. The State argues that the Defendants are really charged withh violating the section of 2183 (G)(1) which prohibits any person from knowingly violating any provision of Chapter 30, the Louisiana Hazardous Waste Control Law which is referred to as 'LHWCL'.
>
> In La. R.S. 30:2202(B), the LHWCL prohibits the violations of the regulations promulgated by the Louisiana Department of Environmental Quality. The Louisiana DEQ regulations are promulgated in the Louisiana Administrative Code referred to as "LAC".
>
> Under LAC 33:105(F) and 33:V.303B, it is impermissible to store hazardous waste without a permit or interim status permit. Therefore, the State contends it can validly charge these three Defendants with violating La. R.S. G-1 for storage of hazardous waste without a permit or interim status permit.
>
> Under [the Louisiana Code of Criminal Procedure] Art. 464, an indictment must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. **Decision of the Trial Judge, Appendix C, p. A-25.**

The judge cites *State v. Union Tank Car Company,* 439 So.2d 373 (La. 1983), for the proposition that the Due Process clauses of the United States and Louisiana Constitutions require that criminal statutes must give adequate prior notice to an individual that certain contemplated conduct is proscribed and punishable by law, and must provide adequate standards to be applied by police, administrators, and the courts in determining the guilt or innocense of an accused. Furthemore, penal statutes must be strictly construed and cannot be extended to cases not included within the clear import of their language—nothing is a crime which is not clearly and unmistakably made a crime.

The court also cites *State v. Dousay,* 378 So.2d 414 (La. 1979), for the proposition that persons cannot be left to guess at the meaning of criminal statutes and regulations. Id., pp. 50-51.

Then the court applies these standards to the indictments against Defendants:

> The Court finds that there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the Court finds that the section of the statute relied on by the State, namely the "catch-all" section prohibiting any person who otherwise knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to be unconstitutionally vague since it does not specifically state charges against these three defendants so as to allow them to adequately prepare for a defense.
>
> For these reasons, the Court hereby grants the Motions to Quash by Defendants Nicolosi, Byrd and Peltier. **Decision of the Trial Judge, Appendix C, p. A-27.**

Petitioner believes the decision of the trial judge was imminently correct; the indictment under La. R.S. 30:2183 G.(1) must be quashed, because the statute does not, on its face, prohibit "storage" of a hazardous waste, and the "catch-all" inclusion of large bodies of administrative regulations is overbroad and fails to satisfy constitutional Due Process standards.

(b) Decision by Louisiana Supreme Court (State v. Byrd, 708 So.2d 401 (La. 1998))

Under Louisiana law, the trial judge's decision quashing the indictments was appealable to the Louisiana Supreme Court, and that court found that "although language contained within the 'catch-all' provision of La. R.S. 30:2183 G.(1) is somewhat expansive because it refers the reader to the entire Chapter on Hazardous Waste Control, we find that the trial court erred in holding the statute unconstitutional." Decision of Justice Johnson, Louisiana Supreme Court, Appendix D, p. A-31.

The Louisiana Supreme Court also found that although the effect of the indictment was to charge Defendants with violation of administrative regulations prohibiting "storage" of hazardous waste (where the legislative statute did not), such a criminalization of conduct by an administrative agency did not constitute an improper delegation of legislative authority.

The court went on to address the question of whether or not La. R.S. 30:2183 G.(1) was unconstitutionally vague or overbroad:

> The Defendants were charged under the "catch-all" section of the statute, i.e., "any person who otherwise knowingly violates any provision of this Chapter." The state expounded upon this in its supplemental response to defendants motion for a bill of particulars citing various waste regulations. La. R.S. 30:2202(A) provides that "[n]o person shall initiate or continue the generation, transportation, treatment, storage, or disposal of hazardous waste except as in compliance with the provisions of this Subtitle." Subsection (B) goes on to provide that "[n]o person shall violate any rule or regulation adopted by the secretary under this Subtitle."
>
> In the instant case, Defendants contend that the statute is vague as applied because the state's attempt to utilize the entire body of hazardous waste regulations as a basis to substantiate the charge fails to give adequate notice and provide adequate standards. Indeed,

the trial court's use of the word "overbraod" appears to be in reference to this very point. **Id., pp. A-39 — A-40.**

In footnote 11 at page A-40, Justice Johnson deals with the "catch-all" provision "that criminalizes violation of any statute contained in the HWCL." And she points out that other statutes in that body of law do prohibit illegal "storage" of hazardous waste: "Consequently, via the 'catch-all' provision of subsection G(1), the state properly charged that defendants illegally stored hazardous waste." Id., p. A-40, fn.11. The Justice also points out that the state in its bill particulars and supplemental bill of particulars did eventually cite specific administrative regulations prohibiting "storage" without interim permits.

Justice Johnson moves away from the question of whether La. R.S. 30:2183 G.(1) is itself overly broad and vague, and relies heavily on a supplemental bill of particulars which narrows the *factual* description of the crime. But Defendants were not complaining about the description of facts which the State alleges were criminal. Petitioner complains that the *statute itself* does not make those facts a crime! The State has alleged that Petitioner stored hazardous waste without a permit, in certain containers, at the Marco of Iota facility. But statute under which he is charged does not make "storage" of hazardous wastes a crime.

In effect, the court avoids the question of "adequate prior notice", and the question of whether or not "catch-all" references to broad administrative regulations are sufficient to describe criminal conduct. Instead, the court looks to the accumulated understanding between the parties up to the time of the hearing on the Motion to Quash, and concludes that Defendants were well aware of the facts which the prosecution was alleging were criminal.

As to the question of whether "catch-all" references are too broad and vague to satisfy Due Process requirements, the court says:

> In the instant case, under the terms of the statute, the conduct proscribed is unambiguous, i.e., "any

person who otherwise knowingly violated any provision of this Chapter ...." An "ordinary person" of "reasonable intelligence" is capable of understanding that to comply with La. R.S. 30:2183 G(1), one must not violate any provision of the HWCL, a self-contained body of statutes dealing with hazardous waste. No person in the hazardous waste industry is called upon to determine when, how or where to store, dispose or emit their hazardous waste. Rather, these activities are well regulated by the HWCL and the regulations implementing those statutes. **Id., p. A-45.**

In addition, by virtue of an indictment or bill of particulars, the exact conduct would be alleged and a defendant could easily find the corresponding statute in the HWCL. Furthemore, as noted earlier with respect to notice, defendants operating in a dangerous industry are charged with knowledge of the regulations of that industry. **Id., p. A-45.**

The court urges that there is really no "vagueness" here: "In the instant case, there are no vague terms; rather, the trial court objected to the construction of the statute in that the statute does not specifically state the various ways in which it may be violated but incorporates other statutes contained withinn the HWCL as well as the body of accompanying hazardous waste regulations to define criminal conduct." Id., p. A-46.

To justify this broad incorporation of "other statutes" and "the body of accomplying hazardous waste regulations", the court relies on a Louisiana case where a game statute making it a crime to shoot "illegal deer" referred to Department of Wildlife and Fisheries regulations defining exactly what an "illegal deer" was — the administrative definition of "illegal deer" would change from time to time. In *State v. Davis,* 448 So.2d 645 (La. 1984), the court found that the statutory reference to game regulations defining "illegal deer" did not constitute an overly broad or vague definition of criminal conduct: "While the statute itself does not define

illegal deer specifically, the statute clearly directs the reader to consult regulations of the Wildlife and Fisheries Commission, and those regulations are clear and unambiguous." *Davis,* 448 So.2d at 649.

Where Justice Johnson's analysis fails, in comparing the case at bar to the "illegal deer" case, is that the statute which referred to the game regulations clearly proscribed the taking of "illegal deer". But in the case at bar, 2183 G.(1) clearly *does not* proscribe the "storage" of hazardous wastes, although other statutes and other administrative regulations may.

The Louisiana Supreme Court reversed the trial court's ruling and held that La. R.S. 30:2183 G.(1) was "constitutional as applied by the State in the indictment against the Defendants". Id., p. A-53. Petitioner's application for a rehearing was denied on April 24, 1998.

(c) ***Dissenting Opinion by Justice Knoll***

Justice Knoll wrote a strong dissent; she says "the trial court correctly found the statute unconstitutionally vague." Dissenting Opinion of Justice Knoll, Appendix D, p. A-54.

La. R.S. 30:2183 G.(1) does not prohibit the "storing" of hazardous waste:

> On its face La. R.S. 30:2183 G(1) shows that the Defendants were indicted on the charge of *storing* hazardous waste, a crime not prohibited in the statute charge. Notwithstanding, the majority finds that the Defendants were charged with a constitutionally sanctioned crime because they were in violation of the "catch-all" section of La. R.S. 30:2183 G(1) as persons who "knowingly violate[d] any provision of this Chapter ...." With this as a starting point, the majority takes a quantum leap and finds that under La. R.S. 30:2180 et seq, the Louisiana Department of Environmental Quality is authorized to promulgate rules and regulations for the management of hazardous wastes. Then, taking it a step further finds that under 33:V.305 permits are required

> for the treatment, storage, and disposal of hazardous waste and that storage of hazardous waste without a permit is proscribed criminal conduct. **Id., pp. A-55 – A-56.**

Justice Knoll urged that penal statutes must be strictly construed and cannot be extended to cases not included within the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime. Penal statutes are vague if they do not notify persons in advance that particular conduct is proscribed and legally punishable. Id., p. A-56. Applying the well established jurisprudence, she concludes:

> ...I find that the trial court was eminently correct in finding La. R.S. 30:2183 G(1) unconstitutionally vague. As pointed out herein, La. R.S. 30:2183 G(1) does not proscribe the *storage* of hazardous waste. By utilizing an attenuated reference to a myraid of regulations to prop up the statute in question, the majority has expanded La. R.S. 30:2183 G(1) beyond the provisions of the legislative enactment and has created a crime which does not exist. For these reasons, I respectfully dissent and would affirm the trial court's determination that La. R.S. 30:2183 G(1) is unconstitutionally vague. **Id., p. A-56.**

In a footnote, Justice Knoll points out that subsection G.(2) clearly makes "storage" of hazardous waste criminal, when there is a threat of bodily harm. A proscription against "storage" could as ealily have been included in 2183 G.(1), if the Legislature had so intended.

(d) Comments

If G.(1) is read in "context" along with G.(2), then a reasonable man of ordinary intelligence would conclude that he could violate G.(2) by "storage" without a permit, but that "storage" would not constitute a violation under G.(1). Certainly, for the sake of clarity, it would have been a simple matter for the Louisiana Legislature to include "storage" in the list of proscriptions under G.(1), if indeed that was

intent. Precise definition was possible and could easily have been achieved by the Legislature, if it meant to proscribe "storage"; there was no need to resort to a sweeping "catch-all" reference.

G.(1)'s sweeping (overbroad and vague) criminalization of all acts of "any person who otherwise knowingly violates any provision of this Chapter", carries a penalty of $100,000.00 per day and /or ten (10) years imprisonment at hard labor. The result is that horrendous penalties could be imposed for minor infractions of any of an extensive array of administrative DEQ and EPA regulations.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review the Judgment of the Louisiana Supreme Court entered March 13, 1998, and that court's order denying Petitioner's Application for Rehearing, issued April 24, 1998. This Court has jurisdiction under authority of 28 U.S.C. §1257(a), which gives Certiorari Jurisdiction to review "final judgments or decrees rendered by the highest court of the State in which a decision could be had,...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution...or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution...or statutes of...the United States."

Additionally, Supreme Court Rule 10.1(c) provides for consideration of Petitions for Writs of Certiorari when "a state court...has decided an important federal question in a way that conflicts with decisions of this Court."

STATUTE INVOLVED

The Louisiana statute questioned in this writ application is Louisiana Revised Statute 30:2183 G.(1), which reads as follows:

> G. (1) Any person who willfully or knowingly discharges, emits, or disposes of any substance in contravention of

> any provision of this Chapter or any regulations or of any permit or license terms and conditions adopted in pursuance thereof, or any person who otherwise knowingly violates any provision of this Chapter, shall upon conviction be subject to a fine of not more than one hundred thousand dollars per day of violation and costs of presecution, or imprisonment at hard labor for not more than ten years, or both.

Petitioner will argue that language of the above statute cannot support a charge for "storage" of hazardous wastes, and is unconstitutionally vague on its face and in its application under the circumstances of this case. Petitioner will compare the language of the above quoted subparagraph G.(1) with language of subparagraph G.(2), which reads as follows:

> (2) Any person who knowingly transports, treats, stores, disposes of, or exports any substance in contravention of any provisions of this Chapter or the regulations or of any permit or license terms and conditions adopted in pursuance thereof, or any person who otherwise knowingly violates any provisions of this Chapter, in such manner that he knows, or should have known, at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than two hundred fifty thousand dollars per day of violation and costs of prosecution, or imprisonment at hard labor for not more than fifteen years, or both.

Petitioner alleges the Louisiana statute violates Due Process guarantees of the Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

(a) *LOWER COURT PROCEDURES*

On August 5, 1994, Petitioner was indicted in Acadia

Parish, Louisiana. The indictment (and bill of particulars) states that from on or about September 1, 1990 through on or about February 28, 1991, Petitioner and other defendants "knowingly stored hazardous wastes at the Marco of Iota, Inc. facility on Louisianna Highway 370 in Acadia Parish, without a permit or interim status for such storage, in violation of the provisions of La. R.S. 30:2183 G.(1)." (See, Indictment, Appendix A; Bill of Particulars, Appendix J.)

Petitioner filed a "Motion to Quash" asserting that La. R.S. 30:2183 G.(1) was indefinite and vague, and therefore should be struck down under the Due Process clause of the United States Constitution. (See, Motion to Quash, Appendix B.)

The trial judge rules in favor of Petitioner, and the indictment was quashed. The judge's reasons are transcribed. (See, Opinion of Trial Court, Appendix C.) The State Attorney General, along with the U.S. Attorney's Office, and the Louisiana Department of Environmental Quality (on amicus curiae) appealed the decision directly to the Louisiana Supreme Court, which in a 4 to 3 decision overruled the trial court and upheld the indictment, ruling that the language of the statute did not offend constitutional Due Process requirements. (See, Opinion of Louisiana Supreme Court, Appendix D.) Justice Knoll wrote a strong dissenting opinion, and two other justices signed that dissent. (Appendix D.) The case is now before this Court on application for writ of certiorari.

(b) FACTUAL BACKGROUND

On October 24, 1989, Marco of Iota, Inc., owner and operator of a facility for the treatment and disposal of hazardous wastes, entered into a Chapter 11 Bankruptcy Reorganization, supervised by the Bankruptcy Court in the Western District of Louisiana. In the course of that bankruptcy reorganization, Reo, Inc. (in which Petioner was an employee) entered into a contract with Marco of Iota, Inc., dated August 24, 1990, and approved by the Bankruptcy

Court on August 27, 1990, under which Marco was to receive and dispose of hazardous wastes. It was understoood at that time that Reo would provide capital allowing Marco to continue business during its bankruptcy reorganization, and that at a future date Marco would issue shares of stock to Reo in exchange for the capital investment. (The shares were never actually issued.)

During the course of bankruptcy reorganization, the question of Marco's right to receive and handle hazardous wastes was a crucial consideration. If Marco had legal authority to receive and handle the wastes, then that authorization was a valuable asset which its creditors could expect to be used profitably. If Marco did not have authorization (if it did not have "interim status") to receive and handle hazardous wastes, then Marco had no future prospect, and the court and creditors would not have authorized a reorganization. (See testimony of John Weinstein - taken at hearing on Motion to Quash, Apendix E.)

During reorganization proceedings, the Bankruptcy Court approved the appointment of an attorney specialist in the field of environmental law, and the opinion of that attorney was solicited and subsequently introduced as evidence in the reorganization proceedings. The attorney's opinion was that that Marco did enjoy "interim status" and was legally authorized to receive and handle hazardous wastes. (See, letter of Attorney Frank S. Craig III, dated August 29, 1990, Appendix F.)

Bankruptcy proceedings terminated on July 16, 1991, and Marco's Iota facility has subsequently gone out of business.

Defendant was charged with "storing" hazardous waste, without a permit, from September 1, 1990 to February 28, 1992. (A subsequent Bill of Particulars reduced the period from September 1, 1990 to February 28, 1991.) These hazardous wastes were discovered during a search of the Marco

facility in February, 1992, sometime after the business relationship between Reo, Petitioner and Marco had terminated.

In 1990, before the date of the alleged violations, the U.S. Environmental Protection Agency published new "Toxicity Characteristic Rules" (TC Rules) re-specifying the types of substances considered "hazardous wastes". Handlers of hazardous wastes were required to file new applications, listing all waste materials being handled. The new TC Rules took effect on September 25, 1990. Marco filed all necessary applications (see, Appendix E & F), and thus expanded its existing "interim status" to continue its operations. In the Affidavit of Dr. Paul Templet, past Secretary of the Louisiana Department of Environmental Quality (Appendix G), attached to Petitioner's Memorandum in Support of his Motion to Quash Indictment, Dr. Templet attests as follows:

> ...[I]nsofar as the Louisiana DEQ permitting authority was concerned at that time, if a facility with existing interim status properly notified EPA with a revised Part A Application that it was treating, storing, and/or disposing of newly regulated hazardous waste as a result of the TC Rule such that its interim status would be expanded at the federal level to include the units (tanks, drums) containing the TC waste, its interim status would likewise be expanded at the state level.

So, Marco's compliance wth EPA regulations, by filing its application, simultaneously satisfied DEQ regulations, and Marco thus expanded its interim status under both EPA and DEQ regulations. (The question of interim status is really quite involved factually, and is not the principle issue on this Writ Application; but it is important to have some familiarity with this interim status question in judging the "context", "facts" and "circumstances" surrounding enforcement of the overly vague provisions of La. R.S. 30:2183 G.(1).)

The testimony of John Weinstein, taken at the hear-

ing on the Motion to Quash, emphasizes that Marco's interim status was its only asset of substantial value during the bankruptcy proceeding — thus the question of "interim status" was an important issue before the Bankruptcy Court. (See, Testimony of Weinstein, Appendix E.) Surely, the Bankruptcy Court's attention to this matter must be Res Adjudicata, precluding the Prosecutors from now asserting that Defendants did not have interim status to handle the hazardous wastes. The Bankruptcy Court approved the contract for handling of hazardous wastes entered into between Marco and Reo.

This Court should also note that the charge against Petitioner carries a penalty of $100,000.00 *per day*, covering the period from September 1, 1990, to February 28, 1991 (a total of 181 days). thus, Petitioner faces a total potential penalty of $18.1 million(!!), plus ten years at hard labor! Petitioner will argue that the confusion and ambiguity of the stataute and charge against him is due in part to the fact that the statute broadly incorporates administsrative regulations of both the Louisiana Department of Environmental Quality and the U.S. Environmental Protection Agency - this mix of state/federal regulatory provisions and powers adds to the overall regulatory complexity, ambiguity, and uncertainty. The Court will also notice that an Attorney from the U.S. Attorney's Office acted as *lead counsel* for the State of Louisiana on appeal.(?)

ARGUMENT

(a) *SOMETHING NEEDS TO BE DONE*

The predicament in which Petitioner finds himself ensnared is the product of a growing complexity, overbreadth, and severity in state and federal environmental laws and regulations (to be found as well in other areas of complex economic activity and governmental regulation). Such statutes and regulations are becoming increasingly more complex and confusing, resorting all to frequently to expan-

sive, ambiguous "catch-all" language, incorporating overlapping federal and state administrative regulations. These catch-all regulations fail to really advise and warn citizens of exactly what actions are being proscribed, or of the severity of penalties involved. Relatively minor infractions, or knowing but guiltless actions, may carry horrendous fines and imprisonment.

Have regulators drifted into "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"? *Albernaz vs. U.S.*, 450 U.S. 333, 343, 101 S.Ct. 1137, 1144, 67 L.Ed. 2d 275 (1981). Honestly, are citizens being provided with *adequate prior notice* of proscribed conduct?

Lower courts applying the imprecise language of some decisions of this Court have been upholding laws with broad "catch-all" references. Sec. *Davis vs. Williams*, 617 F.2d 1100 (5th Cir. 1980). In a strong *Davis* dissent, one judge has insisted that the past liberality of this Court should be limited to special facts then before the Court — referring specifically to *Arnett vs. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974), and in *Parker vs. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974).

Environmental regulations have been around for some time. Up to now, courts have mentioned the need for "flexibility" and "adaptability" in the drafting and judicial interpretation of environmental regulations; this liberality was meant to allow lawmakers to police the vast, newly emerging area of environmental regulation:

> The area is in its infancy, is yet inexact, and consequently is progressively changing. Other states have taken note of the unusual nature of environmental law in considering the constitutionality of statutory prohibitions in this area....
>
> * * *

> By its very nature it defies the establishment of precise standards. It involves a highly specialized science and yet covers an exceedingly broad spectrum. It is complex and not reducible to easy equations, particularly in view of our constantly growing knowledge and understanding of our environment and its effect upon our lives and our very existence. [Citing *Southern Illinois Asphalt Co., Inc., vs. Environmental Protection Agency,* 15 ILL. App. 3d 66, 303 NE 2d 606, 611 Ill (1973)]

> Because statutes directed at the control of air pollution are intended to encompass infinitely variable environmental conditions, flexibility and adaptability are required in meeting factual situations which could not possibly be foreseen by the legislature. *State vs. Braun,* 378 A.2d 640 (Del 1977).... [I]t is sufficient if the statutes be general in nature but at the same time retain standards of sufficient clarity to put the violator on notice. ***State vs. Union Tank Car Company,* 439 So.2d 377, 382 (La. 1983)**

Well, perhaps the era of the judicial leniency, tolerating undue expansiveness, complexity, and unclarity in environmental regulations must end. Today, there is need for clarity, better order, the end of unnecessary complexities, and conflicting language; an end to regulations which fail to warn average citizens and businessmen of precisely what is proscribed; an end to monstrous potential penalties for simple, inevitable infractions.

Something must be done. Our courts can no longer "wink" at broad, vague, severly penalized environmental regulations.

Petitioner feels he has been "SNARED" in a tangle of federal/state statutes/regulations; by permits/interim permits with overlapping delays for filing; by language in a *statute* that excludes "storage" but adopts *administrative regulations*

which nevertheless include "storage", but way of a sweeping "catch-all" reference. Petitioner was acting in good faith compliance with orders of a Bankruptcy Court overseeing and approving the very operations now declared to have been criminal in nature. The question of interim status was inquired into by the Bankruptcy Court when it approved the Chapter 11 plan of reorganization; and it was understood by all that Marco had interim status. Now he finds himself indicted because environmental regulators say Marco *did not* have interim status. Who is in charge here? What is an ordinary citizen to do?

(b) *CONSTITUTIONAL DUE PROCESS – VOID-FOR-VAGUENESS DOCTRINE*

The jurisprudentially developed "void-for-vagueness" doctrine is derived from the Due Process guarantees of the Fifth and Fourteenth Amendments. A statute is void-for-vagueness if its prohibition leaves an individual without knowledge of the nature of the activity being prohibited:

> It is a prime principle of constitutional law that every statute or ordinance affecting the lives, liberties, or property of individuals in the United States must be carefully drafted so that a person of ordinary intelligence in the community can readily learn of the scope of the statute or ordinance. **Antieau and Rich, *Modern Constitutinal Law* (West 2ed 1997), §3.01, p.21.**

> The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise, to punish him for breach of that law is purposeless cruelty. **G. Williams, *Criminal Law: The General Part* (2ed 1961), p. 575.**

> The law must give fair and adequate notice of the conduct constituting an offense if punishment for the commission of that offense is to be just. A variety of rules and doctrines are designed at least in part to assure such

fair notice; the constitutionally mandated void-for-vagueness doctrine, the judicially created rule requiring strict construction of criminal statutes, the prohibition of judicialy created defenses, and the abolition of common law crimes. **Paul H. Robinson, *Criminal Law Defenses* (West, 1984), Vol. 1, §35, p. 149.**

(i) ***Vague laws ensnare the innocent***

"Vague laws may trap the innocent by not providing fair warning. "Grayned vs. City of Rockford, 4087 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed. 2d 222 (1972). This Court has pointed out that vague statutes subject citizens to the "hazard of being prosecuted for knowing but guiltless behavior." *Baggett vs. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed. 2d 377 (1964).

(ii) ***Due Process prohibits vague laws:***

The notion that people should have notice of that which the law forbids is an imminently plausible one of ancient origin. In *Connally vs. General Construction Co.* [269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)], the Supreme Court described it as "the first essential of due process of law." ***Joseph G.Cook, Constitutional Rights of the Accused*, (3ed. 1996), Vol. 1, §1.6, pp. 1-17 through 1-18.**

A statute suffers from the vice of "overbreadth", "when a governmental limitation has not been carefully drawn and narrowly tailored to reach only the specific vice perceived". Anticau and Rich, supra, §3.02, p.23. In determining the constitutionality of a statutory provision alleged to be void for vagueness, state courts are bound by standards laid down by the United States Supreme Court.

(iii) ***Guidelines for judicial review***

To insure against the pitfalls of arbitrainess and entrapment, this Court has developed general guidelines for

review:

> Impermissably vague criminal laws have two vices. First, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." [*Grayned vs. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-2299, 33 L.Ed. 2d 222 (1972).] The requirement of fair notice is essential to due process because "[n]o one may be required at peril of life, liberty or property to speculate at the meaning of penal statutes". (*Lanzetta vs. State of New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 2d 888 (1939).] The second vice of vague penal statutes is that they delegate "basic policy matters to policemen, judges, and juries for resolution on an ad hoc basis, with the attendant danger of arbitrary and discriminatory application." [Grayned, supra. 408 U.S. 104, 108-109.]
>
> It is this latter vice, the danger of discriminatory enforcement, that the Supreme court has labeled "the more important aspect of the vagueness doctrine." [*Kolender vs. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed. 2d 903 (1983).] Where the legislature fails to provide minimal guidelines to govern law enforcement officials, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections!" [*Smith vs. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 1248, 39 L.Ed. 2d 605 (1974).] Such a result would confer lawmaking authority upon the executive or judicial branches, rather than the legaislative branch. **Smith and Reed, Civil Rico (Matthew-Bender) §908, p. 9-71.**

(iv) ***Strict construction of criminal statutes***

The principle that a person must have adequate notice of the meaning and the applicability of penal proscriptions is strictly applied against the state and in favor of an accused:

> It is well settled that penal statutes are subject to a strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. The rule is founded on the tenderness of the law for the rights of individuals; its object is to establish a certain rule ....73 **Am. Jur. 2d - *Statutes*, §293, pp. 451-452.**

The rule that criminal statutes are to be strictly construed against the state and in favor of the accused has been said to be a rule "perhaps not much less old than construction itself". *U.S. vs. Wiltberger*, 18 U.S. 76, 5 L.Ed. 37 (1820). "Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed." *Dunn vs. United States*, 442 U.S. 100, 99 S.Ct. 2190, 2197, 60 L.Ed. 2d 743 (1979). See also, "Rule of Lenitiy", 62 L.Ed. 2d 827.

A Louisiana Supreme Court decision in the area of environmental regulation summarizes these principles well:

> The criminal code itself requires that penal statutes must be strictly construed and can not be extended to cases not included within the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime .... The rules of strict construction applicabale to the interpretation of penal statutes are also required in the interpretation of penal regulations. *United States vs. Mersky*, 361 U.S. 431, 80 S.Ct. 459, 5 L.Ed. 2d 423 (1960). ***State vs. Union Tank Car Company*, 439 So.2d 377, 385 (La. 1983)**

In our case, the trial judge cited *Union Tank Car* and declared La. R.S. 30:2183 G(1) to be unconstitutionally vague and indefinite.

(v) ***No judicial re-writing of criminal statutes***

Courts cannot rewrite or enlarge the statutory defini-

tions of crimes; and this Court has rejected the suggestion that judges develop standards for imposing criminal punishment on a case-by-case basis:

> It is one thing to recognize that some degree of uncertainty exists whenever judges are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis. *U.S. vs. Kozminski,* 487 U.S. 931, 951, 109 S.Ct. 2751, 2764, 101 L.Ed. 2d 788 (1988).
>
> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. [*United States vs. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876); Quoted in *Kolender vs. Lawson,* 416 U.S. 352, 358]. **Smith and Reed, *Civil RICO* (Mathew Bender-current through 1998), §9.08, p.9-71.**

When laws or regulations are vague, courts must not "wink" at the problem, and can not enlarge the breadth of a statute to reach allegedly criminal conduct not naturally described in the clear language of the statute. " A court can not make unconstitutional provisions constitutional by forced constructions...." 16-A Am.Jur. 2d - *Constitutional law,* §174, p.54. The judicial enlargement of criminal statutes is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness. *Pierce vs. United States,* 314 U.S. 306, 62 S.Ct. 237, 86 L.Ed. 226 (1941). A court cannot rewrite a law to conform it to constitutional requirements. *Finely vs. National Endowment for the Arts,* 100 F.3d 671 (9th Cir. 1996). "The cannon of construction that a court should strive to interpret a statute liberally in a way that will avoid an unconstitutional construction is useful in close cases. But it is not a license for the judiciary to rewrite

the language enacted by the legislature. [*Chapman vs. United States,* 500 U.S. 453, 111 S.Ct. 919, 114 L.Ed. 2d 524 (1991)]." 16-A Am.Jur. 2d - *Constitutional Law,* §173, p.53.

(vi) ***Lofty ideals are no excuse for vague criminal laws***

Nor can vague laws be upheld simply because they are intended to serve some hightly beneficial purpose:

> ...[T]he duty of the courts to give effect to the federal and state constitutions by invalidating acts in conflict with the organic law is not affected by the fact that the invalid legislation may seem highly beneficial, or by the fact that great harm or unrest may result from declaring it void. **16-A Am.Jur. 2d - *Constitutional law,* §186, p.68.**

(vii) ***Legislature cannot turn over its responsibility to other branches of government***

In areas of complex newly emerging legislation, good order and clarity in lawmaking can pose a daunting challenge. Nevertheless, a vague statute is not cured simply because the legislature chooses to delegate this difficult task to some administrative agency. There is a general rule that bars delegation of legislative authority to courts or the executive branch. This rule is subject to an exception allowing the legislature to delegate authority to an administrative agency, when the limits of that delegation are clearly defined:

> [T]he requirement that government articulate its aims with a reasonable degree of clarity insures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to thee requirements of law and permits meaningful judicial review. ***Roberts vs. U.S. Jaycees,* 468 U.S. 609, 629, 104 S.Ct. 3244, 3256, 82 L.Ed.2d 462 (1984).**

(C) *STATUTE VAGUE ON ITS FACE AND IN APPLICATION*

The Trial Judge decided that Due Process requires "definiteness". He cited the principle that penal statutes must be strictly construed and cannot be extended to include acts not within the clear import of the statutory language; nothing is aq crime which is not clearly and unmistakably made a crime. (See, Opinion of the Trial Judge, Appendix C. A-26—A-27).

The Trial Judge balked at enforcing administrative regulatory provisions read into the statute under the "catch-all" section referring to "other provisions of the Chapter", which in turn refer to expansive DEQ and EPA administrative regulations, some of which prohibit "storage":

> The Court finds that there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the Court finds that the section of the statute relied on by the State, namely, the "catch all" section prohibiting any person who otherwise knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to bae unconstitutionally vague since it does not specifically state charges against these three Defendants so as to allow them to adequately prepare for a defense. **Opinion of Trial Judge, Appendix C, p. A-27.**

What we have is vagueness or lack of definiteness created by overly broad and convoluted legislative language. What is needed in this complex area of environmental regulation is good order, lack of conflicting regulations, clear, simple, concise language. These regulations should mean what they say, and say what they mean. The Louisiana Legislature has not proscribed "storage" of hazardous waste under La. R.S. 2183 G(1). "Storage" of hazardous waste is proscribed under 2183 G.(2), but only in situations where a person is handling hazardous waste "in such a manner that he knows, or should have known, at that time that he thereby places

another person in *imminent danger of death or serious bodily injury"* (emphasis added). Where no one is put in *imminent danger,* the Legislature has seen fit not to penalize "storage" - and thus did not include a proscription against storage in 2183 G.(1).

Throughout state court proceedings, the Prosecution has argued that although 2183 G.(1) does not proscribe "storage" explicitly, the prohibition can be found among administrative regulations authorized by the Legislature, referred to in "other provisions of this Chapter". La. R.S. 30:2202(B) reads as follows:

> "No person shall violate any rule or regulation adopted by the Secretarty under this Subtitle."

Now there are a number of DEQ and EPA regulations (the EPA regulations are included by reference in DEQ regulations) which do proscribe storage of hazardous waste without required permits. The question is whether or not the "catch-all reference" to other "provisions of this Chapter" and "regulations adopted by the Secretary under this Subtitle"provides sufficient notice to Petitioner that his conduct is proscribed by the statute cited in the charges against him - where the stataute itself has clearly *excluded* "storage".

The case at bar is somewhat different from most Due Process void-for-vagueness actions, in that no single word or phrase can be pointed to as being vague in itself. Instead, we are faced with the word "storage" which is clearly understood but is not included in the statute under which Petitioner is being prosecuted. Petitioner is thus being prosecuted for conduct which is *clearly excluded* from the statute cited by the Prosecution!

Early, we cited several cases showing a confused application of this Court's void-for-vagueness doctrine by lower courts trying to make sense of unfortunate "catch-all crimes". Dissenting opinions have questioned the constitutionality of "catch-all crimes". Justice Knoll's dissenting opinion in our case makes this point, when she decries the utilization of "*an*

atenuated reference to a myriad of regulations to prop up the statute in question":

> It is hornbook law that penal statutes "must be strictly construed and cannot be extended to cases not included within the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime." La. R.S. 14:3; *State vs. Union Tank Car Company.*, 439 So.2d 377, 385 (La. 1983). Likewise, a penal statute is unconstitutionally vague if it fails to notify persons of reasonable intelligence that certain, particular conduct is proscribed and legally punishable, or it fails to provide measurable standards for persons to determine guilt or innocence.
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> * * *
>
> ...[La. R.S. 30:2183 G.(1)] does not proscribe the *storage* of hazardous waste. By utilizing an atenuated reference to a myriad of regulations to prop up the sstatute in question, the majority has expanded La. R.S. 30:2183 G.(1) beyond the provisions of the legislative enactment and has created a crime which does not exist. **Opinion by Justice Knoll, Appendix D, p. A-56**

The jurisprudence requires that when a legislature delegates authority to an administrative agency to "flesh out" statutory law through enactment of administrative regulations, then the legislature must clearly set out "boundaries" to guide the administrative agency in its task. In our case, La. R.S. 30:2183 G.(1) specifically *excludes* "storage", but the administrative regulations nevertheless proscribe it. As a general rule, the mention of one thing implies the exclusion of other things not mentioned: *expressio unis est exclusio alterius.* 73 Am. Jur. 2d - *Statutes,* §211, p. 405. The Louisiana Legislature's decision not to proscribe "storage" under 2381 G.(1), cannot be bypassed and contradicted by subsequent administrative regulations. It will not do to administratively "re-define" and make a crime. conduct inten-

tionally excluded from a statute by the Legislature. In Petitoner's supplemental brief to the Louisiana Supreme Court, the argument was stated as follows:

> The Legislature has specifically addressed the issue of storage of hazardous waste. It makes the storage of hazardous waste illegal where there is a threat of imminent bodily harm. The Legislature has also made it a crime to dispose, discharge or emit hazardous waste where there is no danger of bodily harm. The Legislature has not made it a crime to store hazardous waste where there is not threat of bodily harm. **Defendant's Supplemental Brief to the Louisiana Supreme Court, Appendix H, p. A-96**

In the face of this rule of interpretation (*expressio unis est exclusio alterius*),the Louisiana Department of Environmental Quality in an amicus curiae motion has conjured up the specter that if Louisiana courts refuse to penalize "storage", the State will lose federal funding:

> VI
>
> The federal hazardous waste control law [42 U.S.C. §§6901-6979(b)] allows states to operate their program in lieu of the federal program if the state program is equivalent, consistent, and provides for adequate enforcement....The State's comprehensive program has been authorized by the Environmental Protection Agency (EPA).
>
> VII.
>
> One of the requirements for authorization is that criminal remedies be available against any person that "treats, stores, or disposes of hazardous waste without a permit." 40 CFR 271.16(a)(3)(ii). La. R.S. 30:2183 G.(1) fulfills that requirement. If this ruling is allowed to stand, the state's authorization, and the federal funds associated with it, may be in jeopardy as we would not be providing the adequate enforcement mandated by RCRA [Resource Conservation and Recovery Act] for

authorization. **DEQ Amicus Curiae Motion Louisiana Supreme Court - Appendix I.**

So we see the Prosecution seeks to bolster shaky state law by trotting out the "loss of federal funds" argument. If there is tension between DEQ funding requirements, and Petitioner's constitutional right to be charged only under a clear and definite penal statute, then we urge this Court to uphold Due Process - if the statute is vague or conflicting, let the Legislature do its job and rewrite its law.

"Catch-all crimes" had vogue in the past where statutes proscribed "loitering"., "vagrancy", "pornography", "indecency" — there was thought to be no way to define these "crimes" with sufficient clarity and definiteness. One court decried such statutes for fostering "a dragnet approach to the maintenance of public order that had its roots in feudal England." *U.S. ex rel Newsome vs. Malcolm,* 492 F.2d 1166, 1171 (2nd Cir. 1974). Are modern environmental regulators resorting to a new version of this "dragnet approach"?

Today, legislatures and administrators may have learned to avoid puritanical proscriptions, vague words and unpopular causes. But in areas of complex regulation citizens are more and more faced with impossibly prolix, convoluted, laminated, and expansive expressions, all meant to attain "highly beneficial" goals. Then down the road, in real life, the citizen learns that he can be prosecuted for just about anything the administrator decides is "criminal". As the case law reveals, administrators can be quite arbitrary and capricious at times. The potential for abuse of power by administrators is endemic to vague, expansive, overly complex lawmaking.

Whether or not federal and state administrators are acting arbitrarily in the case at bar must be judged by the surrounding circumstances. How is it that the DEQ stood by during the bankruptcy proceedings, with full knowledge that hazardous wastes were being stored at Marco's warehouse facility in Iota, and that Petitioner and others were participating in that activity, yet DEQ did nothing to prevent

the storage? The Bankruptcy Court oversaw Marco's operations, allowing it to continue handling the hazardous wastes, accepting the opinion of Mr. Craig (the environmental law specialist) that Marco had valid interim permits and was authorized to conduct its business. But after the Bankruptcy Court terminated its Chapter 11 Reorganization, then DEQ, the U.S. Attorney's Office, and the State Attorney General slapped petitioner with an indictment for storage of hazardous waste at the Marco warehouse. Petitioner believes there has been an arbitrary and capricious abuse of authority by administrators and prosecutors.

Is it proper for prosecutors to use a state statute to penalize conduct not clearly proscribed under that statute, but proscribed under companion federal EPA regulations (as was pointed out in the DEQ's Amicus Curiae Brief)? Can states prescribe penalties for violation of federal regulations, without clearly proscribing the punished conduct under some state statute? Or is it acceptable for rulemakers to draft sloppily worded rules, and then depend on the accused, police, courts and juries to "discover" exactly what it was that the legaislature intended to criminalize? Or to resolive conflicting norms?

Throughout the state court processes, the Prosecution has taken the position that although the indictment might be unclear, the problem could be alleviated to some degree by subsequent discovery, and by the Prosecution's reponse to Petitioner's Bill of Particulars. But *post hoc* justifications will not stand:

> If, on its face, a statute is repugnant to the due process clause on account of vagueness, specifications of the details of the offense intended to be charged will not serve to validate it, since it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. **21 Am. Jur. 2d - Criminal Law, §17, p.129; citing, *Lanzetta vs. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939).**

The Louisiana courts below have cited *State vs. Dousay,* 378 So.2d 414 (1979), wherein an argument similar to the Prosecution's was rejected:

> The State also contends, in brief, that any deficiency in the definiteness of the regulation may be compensated for by the defendant's ability to seek clarification of the charges against him by availing himself of discovery devices. This argument ignores the fact that one of the regulation's fatal shortcomings is its failure to provide adequate *prior* notice of the nature of criminal conduct. **Id., p. 417.**

One commentator addresses the issue succinctly:

> A bill of particulars cannot save an invalid indictment...
>
> A prosecuting attorney may not determine what it is that the grand jury has charged. He may not, bu a bill of particulars, make a choice of one or more out of many unidentified crimes. **Mark Rhodes, *Orfield's Criminal procedure Under the Federal Rules*, (LCP, 1985), Vol. 1, §7:130, pp. 625-626.**

CONCLUSION

Petitioner was peripherally involved with a business that went sour. He became involved under the oversight of the Bankruptcy Court, and acted in compliance with the court's reorganization plan, doing what reasonable men would believe to be correct.

He has been charged with illegal "storage" of wastes under a statute which does not prohibit such storage — but the statute makes sweeping reference to extensive bodies of administrative regulations where prohibitions against storage can be found. "Storage" could easily have been listed as a proscribed act under 2183 G.(1) (it is listed in a companion paragraph), but it was not.

Petitioner was not fairly notified, in advance, of the criminal nature of the conduct for which he has been charged. The Grand Jury only cited Petitioner with violation of

2183 G.(1); Prosecutors subsequently cited numerous administrative regulations to support the deficient indictment — but all of this has been done after the fact. Due Process requires fair notice *in advance,* so that a citizen can *avoid* criminal conduct.

Uncertainties in criminal statutes are to be strictly construed in favor of those charged. Uncertainties are resolved in favor of the accused. Nothing can be read into a penal statute by implication.

The Trial Judge was close to the circumstances and held that the law was unconstitutionally overbroad and vague. Three of the seven Louisiana Supreme Court Justices believed the statute was unconstitutionally broad and vague:

> By utilizing an attenuated reference to a myriad of regulations to prop up the statute in question, the majority has expanded La. R.S. 2183 G.((1) beyond the provisions of the legislative enactment and has created a crime which does not exist. **Dissenting Opinion of Justice Knoll, Appendix D, p. A-56.**

In Justice, this Court must grant certiorari to review this matter, and then lay down new standards governing the whole phenomenon of "catch-all crimes" — judicial leniency and deference to sloppiness in the language and structure of environmental regulations must end — something must be done.

Respectfully Submitted,

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